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IN THE

Supreme Court of the United States

OCTOBER TERM 1965

No. 887

WALTER FRANCIS RIGGAN,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

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WALTER FRANCIS RIGGAN,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

Petitioner, Walter Francis Riggan, respectfully prays for writ of certiorari to review the decision and judgment of the Supreme Court of Appeals of Virginia, entered on October 11, 1965, affirming the judgment of the Circuit Court of Arlington County, Virginia.

THE OPINION BELOW

The opinion of the Supreme Court of Appeals of Virginia has not yet been reported, but a copy of said opinion is attached hereto and prayed to be taken as a part hereof, App. 1-10.

JURISDICTION

The opinion of the Supreme Court of Appeals of Virginia was rendered on the 11th day of October, 1965. Jurisdiction to issue the writ is found in the provisions of Section 240(a) of the Judicial Code (28 U.S.C.A., Sec. 1257).

QUESTIONS PRESENTED

(1)

Whether a search warrant for a dwelling was defective when the affidavit in support of it contained nothing more than the naked conclusion of the elements of the crime charged, to wit: the operation of a lottery.

(2)

Whether the tapping of the telephone of the petitioner from which information was gained that caused the police to delay execution of the search warrant which had been previously obtained was so illegal as to taint the entire search and seizure under said warrant.

CONSTITUTIONAL PROVISION

Amendment 4:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATUTE INVOLVED

Section 18.1-340 of the Code of Virginia, 1965 as amended:

If any person:

(1) Set up, promote or be concerned in managing or drawing a lottery or raffle for money or other thing of value.

(2) Knowingly permit such lottery in any house under his control * * *

* * *

Shall be confined in jail not exceeding one year, and fined not exceeding five hundred dollars. For complete Statute see Appendix, page 11.

STATEMENT

Petitioner, Walter Francis Riggan, was charged in a one count indictment with operating a lottery, known as the Numbers Game, in violation of Section 18.1-340 of the Code of Virginia, 1950 as amended.

On the 22nd day of January, 1963 at 4 p.m. Arlington, Virginia policemen conducted a raid in Apartment No. 604-C at 3000 Spout Run Parkway, Arlington, Virginia. Police had obtained a search warrant at approximately 9 or 9:30 a.m. that day. The affidavit in support of the warrant contained no recital of facts but only the conclusion that a crime was being committed in the premises to be searched. It stated under the Provision No. 2 of the affidavit, as the material facts constituting probable cause for issuance of the warrant: "personal observation of the premises and information from sources believed by the police department to be reliable." This one sentence was the entire recital as to probable cause. See Appendix, p. 12.

The raid was originally to have been made at 3 p.m. but the police at approximately 2 p.m. went to 3000 Spout

Run Parkway and obtained a pass key from the manager in charge of the apartment house, which key could fit any apartment. They then proceeded to the basement and tapped into a telephone line leading directly to apartment No. 604-C, which apartment they eventually raided. They listened for approximately 45 minutes to the telephone communications that took place during this period of time for that particular apartment. Upon hearing over the telephone line that a person by the name of "Marion" was coming to the apartment at 4 p.m., they then discontinued their wire tapping activities and proceeded up the stairs where they met the other detectives who were waiting in an apartment directly across the hallway from the apartment where the petitioner was finally arrested.

They waited there then for approximately 1 hour and 15 minutes, to wit, 4 p.m., when a woman, who was in fact "Marion" and it developed that she was Marion Williams, appeared at the door of Apartment 604-C, knocked and as the door was opened the detectives then rushed the door. No execution of the warrant was made prior to this entry nor was there any attempt made before this time. A search of the premises by the police produced a quantity of number slips.

A motion to quash the search warrant and to suppress evidence was timely made in the Circuit Court. A hearing was held and as a result thereof an order was entered denying the motion to quash the search warrant and the motion to suppress as evidence the number slips seized in the raid but granting the motion to suppress any evidence obtained by an illegal wire tap.

During the preliminary hearing of this motion the police admitted indulging in a wire tap, but refused to disclose what was heard as a result of the wire tap, taking the 5th amendment. Later at the trial they did produce their notes of the information received from the wire tap. Detective Stover who swore to the affidavit to obtain a search warrant, at the preliminary hearing admitted that

he had never had the apartment itself under personal observation and his entire personal observations consisted of seeing on a few occasions the petitioner entering or leaving the large apartment building.

The police did not see or hear anyone play any numbers nor did they see the petitioner engage in such an enterprise.

The trial jury found the petitioner guilty and gave him one year in prison.

REASONS FOR GRANTING THE WRIT

The Supreme Court of Appeals of Virginia has interpreted an important Constitutional Provision in direct conflict with the applicable decisions of this Court.

1. The Search Warrant. "It is now settled that the fundamental protections of the Fourth Amendment are guaranteed by the Fourteenth Amendment against the invasion by States." *Stanford v. Texas*, 13 L ed 2d 431, which cites *Mapp v. Ohio*, 367 U.S. 643, 6 L ed 2d 1081.

The trial and appellate court refused to apply the doctrine of *Mapp v. Ohio* in considering whether there was probable cause for the issuance of the search warrant in this case. If they had afforded the petitioner his protection guaranteed him under the Fourth and Fourteenth Amendments the search warrant would have been found to have been issued without probable cause.

The affidavit in support of the search warrant was made out on a mimeographed form, Appendix, p. 12. The form has printed "2. The material facts constituting probable cause for issuance of the warrant . . . ." and then has typed in under the heading the following words, "Personal observation of the premises and information from sources believed by the police department to be reliable." These seventeen words contain everything the Judge had before him as to probable cause when he issued the search warrant. The affidavit did not contain an averment that the

affiant believed there was contraband concealed in the premises to be searched.

"PERSONAL OBSERVATION OF THE PREMISES AND INFORMATION FROM SOURCES BELIEVED BY THE POLICE DEPARTMENT TO BE RELIABLE."

Do these words constitute probable cause or are they simply the bare conclusions of the affiant? When we apply the standards of *Giordenello v. United States*, 357 U.S. 480, we find that they are nothing but conclusions and state no facts which could be reviewed by a Judge.

In *Giordenello* the petitioner challenged the sufficiency of the warrant on the ground that the complaint was defective in that it in effect recited no more than the elements of the crime charged, namely the concealment of heroin with knowledge of its illegal importation.

The Court stated that:

Criminal Rules 3 and 4 provide that an arrest warrant shall be issued only upon a written and sworn complaint (1) setting forth "the essential facts constituting the offense charged," and (2) showing "that there is probable cause to believe that (such) an offense has been committed and that the defendant has committed it . . . ." The provisions of these Rules must be read in light of the constitutional requirements they implement. The language of the Fourth Amendment, that ". . . no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing . . . the persons or things to be seized."

The protection afforded by these Rules, when they are viewed against their constitutional background, is that the inferences from the facts which lead to the complaint "... be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."

The purpose of the complaint, then, is to enable the ap-

propriate magistrate, here a Commissioner, to determine whether the "probable cause" required to support a warrant exists. The Commissioner must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime.

In *Nathanson v. United States*, 290 U.S. 41, and *Aguilar v. Texas*, 12 L ed 2d 723, this Court has stated that probable cause must be found from facts presented under oath to the issuing magistrate.

Also in *United States v. Ventresca*, 380 U.S. 102, 132 L ed 2d 684, this Court has said: "This is not to say that probable cause can be made out by affidavits which are purely conclusory, stating only the affiant's or an informer's belief that probable cause exists without detailing any of the 'underlying circumstances' upon which that belief is based. See *Aguilar v. Texas, supra.* Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police."

2. Wiretapping. The Petitioner respectfully submits that his telephone was tapped without his permission and without the permission of any of the other parties to the conversations listened to. That there was a wire tap, is uncontroverted. The evidence was clear that although a search warrant had been secured at 9:00 or 9:30 a.m. on the 22nd day of January, 1963, this search warrant was not executed until after the wire tap activities and rushing of the door to gain entry. Further, the raid took place after the wire tap activities of 2 members of the raiding party; that these 2 members, as subsequently disclosed on November 8, 1963, intercepted calls to this apartment, giving them thereby information they did not have, and information that was vitally needed, as to possible activities in that apartment. The raid was scheduled to be at

3:00 p.m., however, it is significant that the raid did not take place until after an interception of a message that "Marian" was coming. Marian turned out to be the girl who came to the door. At no time was any attempt made to gain entry, prior to this, either by use of a master key the raiding party had, nor by attempting to execute the warrant by announcing their purpose and requesting entry. The police claimed they believed the door was barred, so they had to wait.

The Court on its hearing of November 4, 1963, sustained the motion of the defendant insofar as any evidence was obtained by the wire tap. At the trial on the merits, it developed that the information intercepted by the wire tap in fact showed the type of activity they suspected and also the time of Marian's arrival. To this point all the evidence clearly shows there was at best mere suspicion or surmise.

The 4th and 14th Amendments of the U.S. Constitution render inadmissible in a state court all evidence obtained as a result of an illegal search and seizure. (*Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 7 L. Ed. 2d 1081.)

CONCLUSION

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari should be granted.

H. CLIFFORD ALLDER

401 Third Street, N. W.
Washington, D. C.

Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that three copies of the Petition for Writ of Certiorari were mailed, with first class postage prepaid, by me to Robert Y. Button, Attorney General for the State of Virginia, Supreme Court - State Library Building, Richmond Virginia 23219, on the 7th day of January 1966.

H. Clifford Allder

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APPENDIX

Present: All Justices.

WALTER FRANCIS RIGGAN

-v- Record No. 6034

COMMONWEALTH OF VIRGINIA

OPINION BY JUSTICE HAROLD F. SNEAD

Richmond, Virginia - October 11, 1965

FROM THE CIRCUIT COURT OF ARLINGTON COUNTY
Walter T. McCarthy, Judge

Upon a plea of not guilty, Walter Francis Riggan, defendant, was found guilty by a jury and in accordance with the verdict was sentenced by the court to a term of one year in the penitentiary and a fine of $500 on an indictment charging that he did "on or about the 22nd day of January, 1963, operate and conduct a lottery, commonly known as the Numbers Game," in violation of Code, § 18.1-340. Defendant is here upon a writ of error and supersedeas awarded him to the judgment rendered on the verdict.

On January 22, 1963, at approximately 9 a.m., William K. Stover, a member of the vice squad of the Arlington county police department, appeared before Judge Paul D. Brown and made affidavit[1] for a warrant to search the

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[1] [Affidavit]

Commonwealth of Virginia:
County of Arlington, to wit:
Before Me, ____, Judge of County Court for the County aforesaid, this day appeared ____ Officer William K. Stover ____ and made affidavit as follows:

(1) Substantially the offense in relation to which search is to be made.____Operation of a lottery, to-wit, numbers game,

(Continued, next page)

premises "known as Apartment 604C, 3000 Spout Run Parkway" in Arlington county in connection with the alleged operation of a lottery or numbers game therein. Pursuant thereto the judge issued the warrant[2]. About a

(*Footnote* 1, *continued*)
in violation of Section 18.1-340 of the Code of Virginia as amended.

(2) The material facts constituting probable cause for issuance of the warrant. Personal observation of the premises and information from sources believed by the police department to be reliable.

(3) What is to be searched for under the warrant? Lottery tickets, including numbers slips, and any gambling paraphernalia made, provided or procurred (sic) for drawing a lottery.

(4) The house, place, vehicle, or baggage to be searched. All of a certain premises known as Apartment 604C, 3000 Spout Run Parkway, Arlington County, Virginia.

Signature of Affiant William K. Stover
Subscribed And Sworn To before me this 22nd day of Jan. 1963.

Paul D. Brown
Judge

Certified to the Clerk of the Circuit Court of Arlington County

Paul D. Brown
Judge

2

[Search Warrant]

In the County Court of Arlington County, Virginia
To the Sheriff or any Police Officer of said County:

Whereas an affidavit has been filed with me pursuant to law and complaint made before me by Officer William K. Stover that a lottery, to-wit: a numbers game is being operated in the premises described below, and that lottery tickets, including numbers slips and gambling paraphernalia made, provided or procurred (sic) in drawing a lottery are believed to be concealed therein. and it appearing that there is reasonable and probable cause for such belief;

These are therefore to authorize and require you, in the name of The Commonwealth of Virginia, to enter in the day or night time the house, place vehichle (sic), or thing described as follows: All of a certain premises known as Apartment 604C, 3000 Spout Run Parkway, Arlington County, Virginia. and there diligently search for the said goods and bring the same and the person or persons in whose possession the

(*Continued, next page*)

half hour later Stover met with Sergeant Kadel and other members of the vice squad. It was then decided that the "raid" would take place about 4 p.m. on that day and that the members of the squad would meet in the manager's office of the apartment house at 3 p.m.

Sergeant Kadel and detective Hughes arrived at the apartment house between 2 and 2:30 p.m., secured a master key to the building from the manager, entered the telephone room in the basement, proceeded to tap the telephone wire to apartment 604C which was to be searched, and listened to conversation passing over the wire. Kadel said that he "listened in to make sure there wasn't any tip-offs." Hughes stated that his "particular reason [for listening] was primarily curiosity" and also to obtain information about other operations.

The officers involved in the raid had obtained information from a confidential source prior to going to the apartment house that a person would appear at the door to apartment 604C at approximately 4 p.m. They knew that the door was barred and they made arrangements with the tenant across the hall for them to wait in her apartment until this person arrived at apartment 604C. Shortly after 3 p.m. officers Stover, Bonneville, Moorefield, Hayden, Hughes and Kadel entered the apartment across the hall, and about 4 p.m. a woman, later identified as Marian Williams, appeared at the door to apartment 604C. When the door was opened for her to enter, the officers rushed in immediately behind her. As they entered Stover announced: "Police, we have a search warrant for numbers slips."

(*Footnote 2, continued*)

same are found, before me to be disposed of or dealt with according to law.

Given Under My Hand And Seal this 22nd day of Jan. 1963.

Paul D. Brown
Judge

Riggan, the defendant, was in the living room attired in his pajamas. There were two beds in the bedroom placed against one another in an L-shape. Carmen Nodarra, who rented the apartment, was on one of the beds and was dressed in "lounging" clothes. Numbers slips, desk pads, paper pads, pencils, dice, an address book, telephones, a telephone book, a purse and a walking cane were found on the beds. The officers also found $118.42 in coins and currency and a stack of "cut cards" in a dresser drawer and $167 in coins and currency together with numbers slips in the handbag of Marian Williams, the person who entered the apartment immediately before the raid commenced.

In the closets there were about twenty suits of clothes together with shirts, ties and a pair of bedroom slippers which belonged to defendant. Near the entrance door was a steel bar which fitted into brackets bolted on the door frame.

After the officers announced that they had completed their search, Riggan went to a dresser, took a roll of $20 bills from the bottom of "a little lamp or something" and put the money into his pocket. He told Carmen Nodarra: "Don't say anything, they have got us, don't say nothing."

The following return was made on the search warrant by officers Stover and Bonneville:

"Executed the within warrant on January 22, 1963 by searching Apartment 604C, 3000 Spout Run Parkway, Arlington, Virginia and seizing three telephones, three desk pads, one bag containing dice, pencisl (sic), ruler, telephone books and numbers slips, lewd books, cut cards, U.S. currency in amount of $118.42, U.S. currency in amount of $167.00, approx. 150 capsules of dexamyl, 1 ladies handbag containing billfold with ident. and miscellaneous papers and one steel bar, and taking into custody one Walter F. Riggan, Carmen D. Nodarra and Marian Williams in whose premises the said articles were found. Given under my hand this 23rd day of January 1963."

In his assignments of error, defendant contends that the court erred (1) in refusing to quash the search warrant and affidavit; (2) in refusing to grant his motion to suppress all evidence obtained as a result of an illegal search and wire tap; (3) in refusing to strike the Commonwealth's evidence, and (4) in refusing to set aside the verdict and grant him a new trial on the grounds that the verdict was contrary to the law and the evidence and the *corpus delicti* had not been proved.

First, defendant challenges the sufficiency of the affidavit upon which the search warrant was issued. Officer Stover stated the following material facts in the affidavit as constituting probable cause for the issuance of the warrant: "Personal observation of the premises and information from sources believed by the police department to be reliable." Defendant says that the uncontroverted testimony revealed that Stover did not have the premises under personal observation. He further states that there was "no evidence of any reliable character to suggest that defendant was engaged in any numbers operation." Hence, he argues, the affidavit and warrant were void. We find these contentions to be without merit.

Stover did testify at the hearing on the motion to quash that he personally did not have the individual apartment (604C) under observation until after he had obtained the search warrant and just before the raid. However, the uncontradicted evidence shows that he had the apartment building under surveillance. Stover testified that on three occasions during the months of December, 1962 and January, 1963 he personally observed Riggan "come and go" from the apartment building. Apartment 604C was a part and parcel of this building.

The police department first became suspicious of the activities in apartment 604C after an investigation was made therein as a result of a child falling out of one of the windows. Later, in November, 1962, officer Hartel went to apartment 604C to execute a warrant of arrest on

Riggan for assault. On this occasion Carmen Nodarra came to the door and asked Hartel if he had a search warrant for the premises. After Hartel informed her of the warrant for Riggan's arrest she closed the door, and there was considerable delay and "scurrying around" in the apartment before he was permitted to enter and execute the warrant on Riggan. After he entered, Hartel observed some telephones in a closet which had been cut from their wires, and he made a report of the situation to the police department. Stover had knowledge of this report and the vice squad commenced an investigation of the activities in the apartment. Stover testified that in addition to his personal observation of the premises he received information from two informants and two police officers that a lottery was being conducted in apartment 604C. He stated that he believed these sources to be reliable, and there was no showing that such sources were not reliable.

In the recent case of *Tri-Pharmacy, Inc. v. United States*, 203 Va. 723, 127 S.E. 2d 89 (cert. den. 371 U.S. 962, 9 L. ed. 2d 509, 83 S.Ct. 542) an attack was made on an affidavit similar to the one here in question. The affidavit read in part: "The material facts constituting probable cause for issuance of the warrant. Personal observation of premises and information from sources thought by the Police Department to be reliable." We held that the affidavit alleged sufficient facts to constitute probable cause for the issuance of the search warrant; that the warrant was valid, and that the evidence obtained as a result of the warrant was admissible. In that case Mr. Justice Buchanan, speaking for the court, discussed at some length the law relating to the sufficiency of an affidavit to constitute probable cause for the issuance of a search warrant. It will serve no useful purpose to restate those principles, but reference to them is hereby made. (203 Va. at pp. 727-730.)

We are not unmindful of the recent case of *Aguilar v. Texas*, 378 U.S. 108, 12 L. ed. 2d 723, 84 S.Ct. 1509, not

cited in the present case by either party. There, the affidavit given by police officers to obtain the search warrant recited in part: "Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purposes of sale and use contrary to the provisions of the law." By a divided court it was held that the affidavit did not provide a sufficient basis for a finding of probable cause; that the search warrant should not have been issued, and that the evidence secured as a result of the warrant was not admissible.

The *Aguilar* case and the case at bar are distinguishable. The affidavit in *Aguilar* was based solely upon hearsay information, whereas in the present case the affidavit recited "personal observation of the premises" as well as "information from sources believed by the police department to be reliable."

We hold that the evidence shows that Stover personally observed the premises as stated in the affidavit; that the sources of information concerning the operation of the lottery were shown to be reliable; that the affidavit was sufficient to constitute probable or reasonable cause for the issuance of the search warrant, and that the court did not err in refusing to quash the affidavit and search warrant.

Defendant next contends that since there was a wire tap by officers Kadel and Hughes shortly before the raid none of the evidence obtained as a result of the raid should have been admitted. Out of the presence of the jury, Hughes read from some skimpy notes he had taken during the wire tap concerning conversations he had intercepted which indicated that a lottery was being operated and that "Marian" was coming to the apartment that afternoon. It developed that "Marian" was the person (Marian Williams) who appeared at apartment 604C and caused the door to be opened just before the officers entered to make the raid. Defendant argues that the offi-

cers secured information by means of the wire tap which they did not previously have and which they vitally needed "as to possible activities in that apartment."

Prior to the jury trial the court granted defendant's motion to suppress evidence obtained under the illegal wire tap and overruled his motion to quash the search warrant and to suppress evidence obtained thereunder.

The record clearly shows that the search warrant was issued hours before the wire tap; that the officers had confidential information before the wire tap that someone would appear at the door of apartment 604C about 4 p.m.; that none of the information received from the wire tap was used in connection with the issuance of the warrant or the execution of the raid in any way, and that no evidence was introduced at the trial which had been obtained by means of the wire tap. Hence, the trial court did not err in refusing to suppress the evidence obtained as a result of the raid.

Finally, defendant contends that the evidence was, as a matter of law, insufficient to support a finding that he was guilty as charged in the indictment. He argues that there was no showing that the alleged numbers slips were made by him or that they represented bets placed for the day in question. He says that the *corpus delicti* was not proved; that at best he was convicted upon "mere suspicion and surmise"; that there was no direct testimony of his guilt; and that other than his "mere presence" the circumstantial evidence was not sufficient to overcome the presumption of his innocence.

A violation of the lottery statute (18.1-340) may be shown by either direct or circumstantial evidence, or both. While numbers slips are essential in the operation of the numbers game, possession of such slips is not required to establish a defendant's guilt. His guilt may be shown by other evidence if sufficient to convict. *Hayden v. Commonwealth*, 203 Va. 398, 401, 124 S.E.2d 13.

The facts and circumstances clearly established that a lottery was being operated and conducted, at least in part, in apartment 604C on January 22, 1963. At that time, when the raid took place, the officers seized numbers slips, desk pads, paper pads, pencils, an address book, telephones and a telephone book which were found on either one or both of the beds. They also seized $118.42 in coins and currency and a stack of "cut cards" found in a dresser drawer, $167 in coins and currency together with numbers slips found in the handbag which Marian Williams brought to the apartment, and a steel bar which was used to secure the entrance door.

Officer Stover, who qualified as an expert witness, stated that he had been engaged in the investigation of various numbers operations for about 5 years and that he had testified in court as an expert relative to the numbers game on numerous occasions. He explained in detail how the numbers business operated, identified the slips of paper found on the beds and in Marian Williams' handbag as numbers slips and stated that the "cut cards" and some of the other items seized were relevant to the operation of the game.

The evidence was also sufficient to show that defendant exercised control over the premises and participated in the operation of the lottery on the date in question. On three occasions prior to the raid officer Stover observed him coming and going from the apartment building. According to Stover, defendant was standing "about halfway behind the door" attired in his pajamas when entry was made for the raid. The officers found in the closets about twenty suits of clothes as well as bedroom slippers, shirts and ties. Defendant admitted that the suits were his and put on one of them just before the officers carried him to the police station. He picked up the cane which had been lying on a bed along with gambling paraphernalia with the explanation that he had injured his leg while participating in athletics. Moreover, he said to Carmen Nodarra: "Don't say anything, they have got us, don't say nothing."

After the officers had completed their search and had informed defendant that anything they might have missed was his, he went to the dresser, took a roll of $20 bills from a hiding place in the bottom of "a little lamp or something", and put it into his pocket. Defendant made no explanation of the presence of the money, numbers slips, "cut cards", or other paraphernalia seized. In fact he did not testify at the trial or offer any evidence in his behalf. For cases involving the sufficiency of the evidence to sustain a conviction for violation of the anti-lottery laws see *Motley v. Commonwealth*, 177 Va. 806, 14 S.E. 2d 28; *Quidley v. Commonwealth*, 190 Va. 1029, 59 S.E. 2d 52; *Hayden v. Commonwealth*, 203 Va. 398, *supra; Tri-Pharmacy, Inc. v. United States*, 203 Va. 723, *supra*.

We conclude that the trial court did not err in refusing to strike the Commonwealth's evidence and in refusing to set aside the verdict.

For the reasons stated, the judgment appealed from is

Affirmed.

CODE OF VIRGINIA, 1965, as amended

18.1-340. Managing, etc., a lottery, etc., or buying, selling, etc., chances. — If any person:

(1) Set up, promote or be concerned in managing or drawing a lottery or raffle for money or other thing of value,

(2) Knowingly permit such lottery in any house under his control,

(3) Knowingly permit money or other property to be raffled for in such house, or to be won therein, by throwing or using dice, or by any other game of chance,

(4) Knowingly permit the sale in such house of any chance or ticket in, or share of a ticket in, a lottery, or any writing, certificate, bill, token or other device purporting or intended to guarantee or assure to any person, or entitle him to a prize or share of, or interest in a prize to be drawn in a lottery, or,

(5) For himself or another person buy, sell or transfer, or have in his possession for the purpose of sale or with intent to exchange, negotiate or transfer, or aid in selling, exchanging, negotiating or transferring, a chance or ticket in or share of a ticket in a lottery, or any such writing, certificate, bill, token or device,

He shall be confined in jail not exceeding one year, and fined not exceeding five hundred dollars, provided that any person who shall violate any of the provisions of this section when such violation shall consist of the operation or conduct of a lottery commonly known as the numbers game or the numbers game or the numbers racket shall be confined in the penitentiary not less than one year nor more than ten years and fined not less than five hundred dollars, or in the discretion of the jury or the court trying the case without a jury, he shall be confined in jail not less than six months nor more than twelve months and fined not more than five hundred dollars, either or both. (Code 1950, 18-301; 1958, c. 377; 1960, c. 358)

AFFIDAVIT FOR SEARCH WARRANT

COMMONWEALTH OF VIRGINIA:
COUNTY OF ARLINGTON, TO WIT:

BEFORE ME,....., JUDGE OF COUNTY COURT for the County aforesaid, this day appeared.....*Officer William K. Stover*.....
and made affidavit as follows:

(1) Substantially the offense in relation to which search is to be made.....*Operation of a lottery, to-wit, numbers game, in violation of Section 18.1-340 of the Code of Virginia as amended*.....

(2) The material facts constituting probable cause for issuance of the warrant.....*Personal observation of the premises and information from sources believed by the police department to be reliable*.....

(3) What is to be searched for under the warrant? .....*Lottery tickets, including numbers slips, and any gambling paraphernalia made, provided or procurred for drawing a lottery*.....

(4) The house, place, vehicle, or baggage to be searched.....*All of a certain premises known as Apartment 604C, 3000 Spout Run Parkway, Arlington County, Virginia*.....

Signature of affiant.....*William K. Stover*.....
SUBSCRIBED AND SWORN to before me this.....*22nd*.....
day of.....*Jan*....., 1963.

.....*Paul D. Brown*.....
Judge

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SUPREME COURT, U. S.

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MAR 31 1966
JOHN F. DAVIS, CLERK

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v.

COMMONWEALTH OF VIRGINIA,

Respondent.

RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1965

No. 887

WALTER FRANCIS RIGGAN,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI

OPINION BELOW

The conviction of the petitioner was affirmed by the Supreme Court of Appeals of Virginia, as shown by the opinion of that Court reported in the case of *Riggan* v. *Commonwealth,* 206 Va. 499, ... S.E. 2d ..... (1965). The judgment was entered on October 11, 1965.

QUESTIONS PRESENTED

(1)

Was the affidavit upon which the search warrant was issued sufficient?

(2)

Where no evidence is introduced which has been obtained by use of a wire tap has the petitioner been deprived of a constitutional right under the Fourth Amendment to the Constitution of the United States?

STATUTE INVOLVED

Section 18.1-340 of the Code of Virginia, 1965 as amended:

If any person:

(1) Set up, promote or be concerned in managing or drawing a lottery or raffle for money or other thing of value.

(2) Knowingly permit such lottery in any house under his control * * *

* * *

Shall be confined in jail not exceeding one year, and fined not exceeding five hundred dollars.

STATEMENT

The petitioner, Walter Francis Riggan, was found guilty of operating a lottery, known as the Numbers Game, in violation of Section 18.1-340 of the Code of Virginia, 1950 as amended.

The petitioner now seeks to attack this conviction by attacking the sufficiency of the affidavit in support of the warrant and in having this Court determine that the mere use of the word "wire tap," where no evidence is presented as a result of a wire tap, is in violation of the Fourth Amendment to the Constitution of the United States.

The affidavit in support of the search warrant in Provision No. 2 stated, "personal observation of the premises and information from sources believed by the police department to be reliable." However, the Record before the Supreme Court of Appeals contained specifics which were brought out by petitioner to explain the language used in Provision No. 2. These specifics appear in the Court's opinion and will not be elaborated upon here.

While petitioner in the trial court below sought to get evidence before the jury which had been obtained from a wire tap, the Record and Opinion of the Supreme Court of Appeals clearly and unequivocally show that none of the information received from the wire tap was used in connection with the issuance of the warrant or the execution of the raid in any way, and that no evidence was introduced at the trial which had been obtained by means of the wire tap.

REASONS FOR REFUSING THE WRIT

I.

The Affidavit was Sufficient to Constitute Probable or Reasonable Cause for the Issuance of the Search Warrant.

The affidavit[1] upon which the search warrant was issued

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[1]

[Affidavit]

Commonwealth of Virginia:
County of Arlington, to wit:

Before me, ..., Judge of County Court for the County aforesaid, this day appeared ..... Officer William K. Stover ..... and made affidavit as follows:

(1) Substantially the offense in relation to which search is to be made. ..... Operation of a lottery, to-wit, numbers game, in violation of Section 18.1-340 of the Code of Virginia, as amended. .....

is attacked by the petitioner as being nothing more than a naked conclusion of the elements of the crime of the operation of a lottery. This bold assertion of petitioner is not, however, supported by the argument in his petition.

To the contrary, the affidavit was sufficient to constitute probable or reasonable cause for the issuance of the search warrant and such sufficiency was clearly and succinctly set forth in the opinion of the Virginia Supreme Court of Appeals in *Riggan* v. *Commonwealth,* 206 Va. 499, ... S.E. 2d ..... (1965), viz:

> "[1] First, defendant challenges the sufficiency of the affidavit upon which the search warrant was issued. Officer Stover stated the following material facts in the affidavit as constituting probable cause for the issuance of the warrant: 'Personal observation of the premises and information from sources believed by the police department to be reliable.' Defendant says that the uncontroverted testimony revealed that Stover did not have the premises under personal observation. He further states that there was 'no evidence of any re-

(2) The materials facts constituting probable cause for issuance of the warrant. ..... Personal observation of the premises and information from sources believed by the police department to be reliable. .....

(3) What is to be searched for under the warrant? ..... Lottery tickets, including numbers slips, and any gambling paraphernalia made, provided or procured (sic) for drawing a lottery. .....

(4) The house, place, vehicle, or baggage to be searched. ..... All of a certain premises known as Apartment 604C, 3000 Spout Run Parkway, Arlington County, Virginia. .....

Signature of Affiant ..... William K. Stover ..... Subscribed And Sworn To before me this ..... 22nd ..... day of Jan. ..... 1963.

..... Paul D. Brown .....
Judge

Certified to the Clerk of the Circuit Court of Arlington County

..... Paul D. Brown .....
Judge

liable character to suggest that defendant was engaged in any numbers operation.' Hence, he argues, the affidavit and warrant were void. We find these contentions to be without merit.

Stover did testify at the hearing on the motion to quash that he personally did not have the individual apartment (604C) under observation until after he had obtained the search warrant and just before the raid. However, the uncontradicted evidence shows that he had the apartment building under surveillance. Stover testified that on three occasions during the months of December, 1962 and January, 1963 he personally observed Riggan 'come and go' from the apartment building. Apartment 604C was a part and parcel of this building.

The police department first became suspicious of the activities in apartment 604C after an investigation was made therein as a result of a child falling out of one of the windows. Later, in November, 1962, officer Hartel went to apartment 604C to execute a warrant of arrest on Riggan for assault. On this occassion Carmen Nodarra came to the door and asked Hartel if he had a search warrant for the premises. After Hartel informed her of the warrant for Riggan's arrest she closed the door, and there was considerable delay and 'scurrying around' in the apartment before he was permitted to enter and execute the warrant on Riggan. After he entered, Hartel observed some telephones in a closet which had been cut from their wires, and he made a report of the situation to the police department. Stover had knowledge of this report and the vice squad commenced an investigation of the activities in the apartment. Stover testified that in addition to his personal observation of the premises he received information from two informants and two police officers that a lottery was being conducted in apartment 604C. He stated that he believed these sources to be reliable, and there was no showing that such sources were not reliable.

In the recent case of *Tri-Pharmacy, Inc.* v. *United States,* 203 Va. 723, 127 S.E. 2d 89 (cert. den. 371 U.S. 962, 9 L. ed. 2d 509, 83 S. Ct. 542) an attack was made on an affidavit similar to the one here in question. The affidavit read in part: 'The material facts constituting probable cause for issuance of the warrant. Personal observation of premises and information from sources thought by the Police Department to be reliable.' We held that the affidavit alleged sufficient facts to constitute probable cause for the issuance of the search warrant; that the warrant was valid, and that the evidence obtained as a result of the warrant was admissible. In that case Mr. Justice Buchanan, speaking for the court, discussed at some length the law relating to the sufficiency of an affidavit to constitute probable cause for the issuance of a search warrant. It will serve no useful purpose to restate those principles, but reference to them is hereby made. (203 Va. at pp. 727-730.)

We are not unmindful of the recent case of *Aquilar* v. *Texas,* 378 U. S. 108, 12 L. ed. 2d 723, 84 S. Ct. 1509, not cited in the present case by either party. There, the affidavit given by police officers to obtain the search warrant recited in part: 'Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purposes of sale and use contrary to the provisions of the law.' By a divided court it was held that the affidavit did not provide a sufficient basis for a finding of probable cause; that the search warrant should not have been issued, and that the evidence secured as a result of the warrant was not admissible.

The *Aquilar* case and the case at bar are distinguishable. The affidavit in *Aquilar* was based solely upon hearsay information, whereas in the present case the affidavit recited 'personal observation of the premises' as well as 'information from sources believed by the police department to be reliable.'

> We hold that the evidence shows that Stover personally observed the premises as stated in the affidavit; that the sources of information concerning the operation of the lottery were shown to be reliable; that the affidavit was sufficient to constitute probable or reasonable cause for the issuance of the search warrant, and that the court did not err in refusing to quash the affidavit and search warrant."

Petitioner cites as authority for his attack on the affidavit several cases, all of which are distinguishable from the case at bar.

In *Giordenello* v. *U. S.*, 357 U. S. 480, the petitioner was convicted of the unlawful purchase of narcotics after a trial without a jury before a Federal District Court of Texas. The Court of Appeals affirmed. It was held by the United States Supreme Court that the arrest and seizure was illegal, the narcotics should not have been admitted in evidence, and the conviction must be set aside. The Supreme Court held that under Rules 3 and 4 of the Federal Rules of Civil Procedure, read in the light of the Fourth Amendment, probable cause was not shown by the complaint and the arrest warrant was issued illegally.

A Federal officer obtained a warrant for petitioner's arrest on his own complaint but failed to obtain a search warrant. His complaint was not based on his personal knowledge, did not indicate the source of his belief that petitioner had committed a crime and set forth no other sufficient basis for a finding of probable cause. With only this arrest warrant, he arrested petitioner and seized narcotics in his possession.

This case is clearly distinguishable from the case at bar wherein a search warrant was obtained by police. In addition thereto, it was quite clear from the evidence adduced at the trial that the officer involved in the case at bar (*Riggan*

case) had personally observed the premises and obtained information from reliable sources, whereas in this case there was no evidence of such action by the police.

The case of *Nathanson* v. *U. S.*, 290 U.S. 41 (1933) involved a prosecution under the National Prohibition Act for unlawful possession of intoxicating liquors. A warrant was issued by a State judge to a customs agent to search a private dwelling. The questioned warrant expressly stated that the officer under oath "had cause to suspect and does believe" that certain merchandise was within the premises of the petitioner. It was held that under the Fourth Amendment, an officer may not properly issue a warrant to search a private dwelling unless he can find probable cause therefor from facts or circumstances presented to him under oath or affirmation. The Court stated that mere affirmance of belief or suspicion is not enough. Consequently, petitioner's conviction was reversed.

This case can be distinguished from *Riggan* in that the search warrant was clearly insufficient to show probable cause because the customs agent (officer herein) merely stated under oath he "had cause to suspect and believed" these prohibited intoxicating liquors were in petitioner's possession. The customs agent had no other reason to request issuance of the warrant. However, in the *Riggan* case the officer making the affidavit was shown to have had the building under personal observation, seeing the defendant go in and out. In addition, the facts show he was supported by other police officers who had entered the apartment and observed evidence of a numbers game being conducted.

In *U.S.* v. *Ventresca*, 380 U.S. 102 (1965) the respondent was convicted of possessing and operating an illegal distillery in the U. S. District Court. His conviction was reversed by the Court of Appeals which held the warrant insufficient to

establish probable cause. This decision was reversed by the Supreme Court by its holding that the affidavit amply showed facts to establish probable cause to support the issuance of the search warrant.

An Investigator for the Alcohol and Tobacco Tax Division made an affidavit stating his belief, on the basis of his own observation, as well as observations and investigations of others, that there was an illegal distillery operation in respondent's house. A description of events leading up to time of the arrest was set out in the affidavit such as cars being driven to the rear of respondent's house with loads of sugar or empty cans, the loading of apparently full five-gallon cans, the smelling by investigators of fermenting mash as they walked in front of the house and their hearing the sound of a motor pump and metallic noises from the direction of the house.

In petitioner's brief on page 7 he cites some of the language of this Court in *U. S.* v. *Ventresca.* That language is followed by the following remarks by the Court: "However, where these circumstances are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner. Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants."

It is submitted that in the present case the circumstances in the affidavit were sufficiently set forth, as well as the sources of information, and the magistrate found "probable cause" to issue the search warrant. The affidavit herein should be construed in a commonsense manner.

II.

None of the Information Received from the Wire Tap Was Used in Connection with the Issuance of the Warrant or the Execution of the Raid in any way, and no Evidence was Introduced at the Trial which had been Obtained by means of the Wire Tap.

The Record below and the Opinion of the Supreme Court of Appeals of Virginia show categorically that none of the information received from the wire tap was used in connection with the issuance of the warrant or the execution of the raid in any way, and that no evidence was introduced at the trial which had been obtained by means of the wire tap.

This is succinctly set forth on pages 504-5 of the opinion, viz:

> "[2] Defendant next contends that since there was a wire tap by officers Kadel and Hughes shortly before the raid none of the evidence obtained as a result of the raid should have been admitted. Out of the presence of the jury, Hughes read from some skimpy notes he had taken during the wire tap concerning conversations he had intercepted which indicated that a lottery was being operated and that 'Marian' was coming to the apartment that afternoon. It devloped that 'Marian' was the person (Marian Williams) who appeared at apartment 604C and caused the door to be opened just before the officers entered to make the raid. Defendant argues that the officers secured information by means of the wire tap which they did not previously have and which they vitally needed 'as to possible activities in that apartment.'
>
> Prior to the jury trial the court granted defendant's motion to suppress evidence obtained under the illegal wire tap and overruled his motion to quash the search warrant and to suppress evidence obtained thereunder.
>
> The record clearly shows that the search warrant was issued hours before the wire tap; that the officers

had confidential information before the wire tap that someone would appear at the door of apartment 604C, about 4 p.m.; that none of the information received from the wire tap was used in connection with the issuance of the warrant or the execution of the raid in any way, and that no evidence was introduced at the trial which had been obtained by means of the wire tap. Hence, the trial court did not err in refusing to suppress the evidence obtained as a result of the raid."

CONCLUSION

WHEREFORE, it is respectfully submitted that the petition for writ of certiorari should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the Response To The Petition For a Writ of Certiorari were mailed, with first class postage prepaid, by me to H. Clifford Allder, 401 Third Street, N.W., Washington, D. C., on the 30th day of March, 1966.

M. HARRIS PARKER